BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTINE RHODES	)	
Claimant	)	
	)	
VS.	)	
	)	
BIG LAKES DEVELOPMENTAL CTR., INC.	)	
Respondent	)	Docket Nos. 1,034,039 &
	)	1,032,709
AND	)	
	)	
CONTINENTAL WESTERN INS. CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the August 30, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant's knee injury arose out of the course of her employment and was therefore compensable.[1] Dr. Jamie McAtee was designated as the authorized treater and his bills were ordered paid.

The respondent requests review of whether the claimant suffered personal injury by accident arising out of and in the course of her employment citing *Johnson.*[2] Respondent argues that although the claimant suffered injury to her left knee while at work, her injury occurred while raising up from her office chair, an act that occurs outside the workplace. Thus, respondent requests the Board reverse the ALJ's Order.

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[1] The ALJ denied claimant's request for additional treatment for her alleged back injury, but this aspect of the ALJ's preliminary hearing Order is not in dispute.

[2] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

Claimant argues that the ALJ's order should be affirmed in all respects. Claimant maintains that her injury resulted not just from the act of getting out of her chair to get postage but also from earlier in the day helping clients put on their shoes at the bowling alley. And that both activities are not activities of "day to day living". Thus, this factual scenario is distinguishable from that present in *Johnson*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant is employed as a secretary for respondent, a facility that provides services to developmentally challenged individuals. On November 20, 2006, claimant went to a bowling alley with some of respondent's clients and according to her, she was involved in the process of helping two of those clients tie their bowling shoes. Another employee, Carla Woods, suggests claimant was at the bowling alley on her break and did not help with the clients, much less tie their shoes. But Ms. Woods' version is less than persuasive and somewhat illogical.

Ms. Woods indicated that claimant left the office to travel across town on her 15 minute break to buy a soda and a pretzel at the bowling alley, coincidentally arriving at the bowling alley at the same time as Ms. Woods, awaiting the arrival of the van transporting the clients. The two talked about helping the clients and Ms. Woods told claimant there was no need to help them with their shoes. So, according to Ms. Woods, claimant merely talked to one of the clients and then left, at the conclusion of her 15 minute break.

To the contrary, claimant testified that her supervisor, Karen Adams, directed her to go to the bowling alley and provide "coverage" for the clients, ensuring sufficient staff/client ratio. And it was during this time that she helped 2 clients tie their shoes and suffered the onset of her left knee complaints.

Claimant testified that these clients placed their feet on the top of her left knee while she tied each shoe. Claimant testified that the clients lightly pushed and she felt some pressure but no significant pain or problems, although she also says that her knee bothered her occasionally throughout the remainder of the workday.

At approximately 3:45 p.m. that same day, claimant was sitting at her desk performing her job, processing mail when she swivelled her chair to the right and got up to get postage for the mail. As she did so, she placed weight on her left leg and immediately felt a sharp pain in her left knee. This was in the same area as she felt pain earlier in the day. It is important to note that when asked to prepare a narrative of her accident, claimant recited not just the event getting out of her chair, but also the earlier event at the bowling alley.

Claimant was unable to walk and was taken by wheelchair to a local emergency room. There, she told the physician's assistant of her initial pain while tying shoes. Claimant was referred to an orthopaedic surgeon, Dr. Jamie McAtee.

Dr. McAtee saw the claimant on December 5, 2006 and she told him of hurting her knee while getting out of a chair at work. She also referenced the event at the bowling alley and suggested that she possibly hurt her knee at that time, earlier in the day. He diagnosed a complex tear of her left medial meniscus with an exacerbation of preexisting arthritic condition. Dr. McAtee recommended arthroscopic surgery to debride her left meniscus, a procedure that respondent has failed to authorize.

At her attorney's request, claimant was evaluated by Dr. Sergio Delgado on May 24, 2007. Dr. Delgado reviewed claimant's medical records, including those from her family physician, Dr. McAtee, and the diagnostic MRI ordered by Dr. McAtee. He agreed with Dr. McAtee's diagnosis and recommendation for surgery, attributing her need for surgery to the November 20, 2006 work accident. Unfortunately, Dr. Delgado's recitation of the mechanism of injury was, by all accounts, inaccurate. He indicated that claimant hurt her knee "while getting up from a sitting position" while at the bowling alley, when in fact, claimant was standing when helping the clients. And his recitation goes on to talk about how the pain in claimant's left knee was the result of a "twisting maneuver while getting up."[3] It would appear that Dr. Delgado confused the two events in his mind while considering the causation aspects of this claim.

The ALJ granted claimant's request for the payment of medical bills and further medical treatment. In doing so, he set forth the following reasoning:

> In Nancy A. Johnson v. Johnson County, Workers Compensation Board docket no. 1,008,536, the claimant injured her knee "when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead." The Board held the claim compensable, finding:
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> > The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*[4] and *Boeckmann*.[5] But claimant's injury in this case is distinguishable from both *Martin* and *Boeckmann*. The Court in *Boeckmann* distinguished cases in which "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to

[3] P.H. Trans., Cl. Ex. 1 at 2 (Dr. Delgado's May 24, 2007 report).

[4] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[5] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

> support a finding of compensability.[6] The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to include injuries caused or aggravated by the strain or physical exertion of work.
>
> The Court of Appeals [footnote omitted] rejected the Board's reasoning, finding that an injury will not be compensable if the employment does not expose the worker to an increased risk of injury of the type actually sustained, or, in other words, the employee was not exposed to hazards which s/he would have been exposed apart from the employment.[7]
>
> The Court of Appeals decision conflicts with Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979), which in discussing whether the claimant's accident arose out of employment, categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.
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> In the case at bar, the evidence before the Court indicates that the claimant's injury falls into the neutral risk category; as such, it arose out of her employment, and is compensable.[8]

This Board Member has considered the record as a whole as well as the ALJ's analysis and concludes the preliminary hearing Order should be affirmed. Like the ALJ, this Board Member concludes that claimant's left knee injury arose out of and in the course of her employment with respondent and was not the result of an activity of day-to-day living.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

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[6] *Id.* at 737.

[7] The Court of Appeals decision reduces some questions of compensability to a pure mathematical exercise. Following such reasoning an employee's fall down stairs will not be compensable, if outside of work the employee traverses more stairs than found in the workplace.

[8] ALJ Order (Aug. 30, 2007) at 1-2.

[9] K.S.A. 1999 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

An injury is not considered directly caused by one's employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[12] This distinction was recently discussed in *Johnson* and the Board's long held interpretation of the day-to-day exception was rejected. According to the Court of Appeals, an injury will not be found compensable if the employment does not expose the worker to an increased risk of injury of the type actually sustained.[13] Simply put, there is no compensability for an act of "coincidence" while at work, absent some sort of aggravating factor present solely because of the job or the workplace.

Nonetheless, the instant facts present a distinguishable scenario from those present in *Johnson*. Although claimant's significant symptoms came upon her after she swivelled in her chair while sitting at her desk, an act that is strikingly similar to that present in *Johnson*, claimant has consistently recited the onset of her injury as earlier in the day *while a client's foot was pressing upon her left knee*. This act, performed while in her employer's service, represents a maneuver that is not an activity of day-to-day living, at least based on this record. For this reason, this Board Member finds this to be a compensable event. And as such, the ALJ's preliminary hearing is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[14] Moreover, this review

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[11] *Id.*, 258 Kan. 272, 899 P.2d 1058 (1995)

[12] K.S.A. 2006 Supp. 44-508(e).

[13] The ALJ noted that this decision "reduced some questions of compensability to a pure mathematical exercise". This Board Member agrees.

[14] K.S.A. 44-534a.

on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated August 30, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2007.

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge